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# DISTINGUISHING LAY FROM EXPERT OPINION: THE NEED TO FOCUS ON THE EPISTEMOLOGICAL DIFFERENCES BETWEEN THE REASONING PROCESSES USED BY LAY AND EXPERT WITNESSES

*Edward J. Imwinkelried\**

JUSTICE Holmes once remarked that the law is constantly drawing lines.<sup>1</sup> That remark certainly holds true for Evidence law. There are a myriad of distinctions in Evidence law.<sup>2</sup> For instance, although there is a general rule excluding hearsay evidence,<sup>3</sup> the rule is inapplicable when the testimony about the out-of-court statement is logically relevant for a non-hearsay purpose,<sup>4</sup> that is, a purpose other than proving the truth of the assertions in the statement. Likewise, there are distinct rules for character evidence relevant to a witness's credibility<sup>5</sup> and character evidence offered to prove a fact on the historical merits of the case.<sup>6</sup> Thus, although Evidence law sharply restricts character evidence relevant to the historical merits,<sup>7</sup> those restrictions pose no barrier to admissibility when the proponent of the item of evidence can identify a viable non-character theory of logical relevance.<sup>8</sup> For example, suppose that an accused is charged with a February 1 theft. The character evidence rules would preclude the prosecution from offering testimony about a January 1 theft by the same accused if the prosecution's only theory of logical relevance were that the January theft showed that the accused has a propensity for theft and, hence, is more likely to have committed the Febru-

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\* Edward L. Barrett, Jr. Professor of Law Emeritus, School of Law, University of California Davis; former chair, Evidence Section, American Association of Law Schools; coauthor, Paul C. Giannelli, Edward J. Imwinkelried, Andrea Roth & Jane Campbell Moriarty, *Scientific Evidence* (5th ed. 2012).

1. OLIVER WENDELL HOLMES, *THE COMMON LAW* 127 (1881).

2. EDWARD J. IMWINKELRIED, *EVIDENTIARY DISTINCTIONS: UNDERSTANDING THE FEDERAL RULES OF EVIDENCE* (1993).

3. FED. R. EVID. 802.

4. FED. R. EVID. 801(c).

5. FED. R. EVID. 608–09.

6. FED. R. EVID. 404–05.

7. *Id.*

8. FED. R. EVID. 404(b).

ary crime.<sup>9</sup> However, assume that in the January theft, the accused stole a pistol with a unique serial number. Assume further that the perpetrator of the February crime inadvertently dropped that very pistol at the crime scene. In those circumstances, the prosecution could introduce the testimony on the non-character theory that without positing any forbidden assumption about the accused's propensity, the evidence about the uncharged, January crime is logically relevant to show the accused's identity as the perpetrator of the charged, February offense.<sup>10</sup>

In the past, federal courts,<sup>11</sup> state courts,<sup>12</sup> and commentators<sup>13</sup> have often complained that these distinctions are thin and problematic. Today a similar complaint is being leveled against another evidentiary distinction, that is, the difference between lay opinion and expert opinion testimony.<sup>14</sup> According to some commentators, the courts are currently experiencing "tremendous difficulty" differentiating between those two types of opinion testimony.<sup>15</sup> The distinction calls on the courts to determine "when [an opinion] leaves the lay witness realm and crosses over into the expert witness realm."<sup>16</sup> Many courts are struggling to define "the fine line" between the two kinds of opinion testimony.<sup>17</sup>

It is not just that the line is proving difficult for some courts to manage. In the past two decades, the line has assumed greater importance than ever before.

To begin with, the line has a tremendous impact on pretrial discovery. Since 1993,<sup>18</sup> Federal Rule of Civil Procedure 26 has mandated that the proponent of an expert witness disclose to the opposition a report

9. FED. R. EVID. 404(a) ("Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character."). Under Rule 105, upon request the trial judge must give the jury a limiting instruction. FED. R. EVID. 105. In one negative prong of the instruction, the judge would forbid the jury from reasoning simplistically that "he did it once, therefore he did it again." In the other, affirmative prong, the judge would explain the legitimate non-character use of the evidence.

10. FED. R. EVID. 404(b)(2) ("This evidence may be admissible for another purpose, such as proving . . . identity . . .").

11. *United States v. Derington*, 229 F.3d 1243, 1247 (9th Cir. 2000) ("There is, no doubt, a fine line between evidence proving character (inadmissible) and evidence proving matters like intent and lack of mistake (admissible)."); *United States v. Bass*, 794 F.2d 1305, 1312 (8th Cir. 1986).

12. *State v. Brown*, 900 A.2d 1155, 1160 (R.I. 2006) ("The line between Rule 404(a) evidence presented for the impermissible purpose of demonstrating propensity and Rule 404(b) evidence presented for one of the specific non-propensity exceptions is both a fine one to draw and an even more difficult one for judges and juries to follow.").

13. Note, *Admissibility of Evidence of Similar Offenses in Criminal Prosecutions in West Virginia*, 54 W. VA. L. REV. 142, 144 (1951); Note, *Rule 311—Evidence of Other Crimes or Civil Wrongs*, 1947 WIS. L. REV. 405, 411 n.11 (1947).

14. Susan C. Scieszinski, Note, *Using Nonscientific Expert Testimony: A Play-by-Play Toolkit*, 61 *DRAKE L. REV.* 1161, 1181 (2013).

15. *Id.* at 1181.

16. *Id.*

17. *Id.* at 1182.

18. EDWARD J. IMWINKELRIED & THEODORE Y. BLUMOFF, *PRETRIAL DISCOVERY: STRATEGY AND TACTICS* § 5:3 (rev. 2004).

previewing the expert's proposed testimony.<sup>19</sup> The mandate is part of a new set of required pre-discovery disclosures; the proponent must provide the opposition with the report even if the opposition has not requested the report.<sup>20</sup> The report must be detailed.<sup>21</sup> In the words of Rule 26, the report must set out, *inter alia*, "all opinions the witness will express and the basis and reasons for them."<sup>22</sup> Furthermore, the mandate has real teeth. If the proponent fails to file the report in a timely fashion, the trial judge can altogether bar any testimony by the expert.<sup>23</sup> Even if the proponent files a report, the report limits the permissible testimony by the expert; at trial, the expert may not testify about an opinion omitted in the report.<sup>24</sup> However, by its terms, the Rule 26 provision applies only to expert opinion testimony.<sup>25</sup> In contrast, there is no need for a report describing any lay opinion testimony that the proponent contemplates introducing at trial. In the same year, 1993, Federal Rule of Criminal Procedure 16 was amended to give an accused a right to demand a similar report.<sup>26</sup> Like its civil counterpart, the Rule 16 requirement is restricted to expert testimony.<sup>27</sup>

Another 1993 development, the Supreme Court's rendition of its celebrated decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,<sup>28</sup> also enhanced the importance of the distinction between lay and expert opinion testimony. In that case, the Court had occasion to interpret Federal Rule of Evidence 702.<sup>29</sup> The statute governs the admissibility of expert testimony.<sup>30</sup> The wording of the statute refers to "scientific, technical, or other specialized knowledge."<sup>31</sup> The Court focused on the expression, "scientific . . . knowledge."<sup>32</sup> The Court adopted an essentially methodological definition of the expression.<sup>33</sup> The Court announced that before a scientific witness may rely on a theory or technique as the premise for

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19. FED. R. CIV. P. 26(a)(2)(B); *Consol. Envtl. Mgmt., Inc. v. Zen-Noh Grain Corp.*, 981 F. Supp. 2d 523, 531–33 (E.D. La. 2013).

20. FED. R. CIV. P. 26(a)(1)(A) ("without awaiting a discovery request").

21. *R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 271 (6th Cir. 2010) ("Expert reports must include 'how' and 'why' the expert reached a particular result, not merely the expert's conclusory opinions."); *Adams v. J. Meyers Builders, Inc.*, 671 F. Supp. 2d 262, 268–70 (D.N.H. 2009).

22. FED. R. CIV. P. 26(a)(2)(B).

23. *Proveris Scientific Corp. v. Innovasystems, Inc.*, 536 F.3d 1256, 1267–68 (Fed. Cir. 2008); *Dairy Farmers of Am., Inc. v. Travelers Ins. Co.*, 391 F.3d 936, 943 (8th Cir. 2004); *Sih v. United States*, 90 Fed. Appx. 940 (7th Cir. 2004); *Griffith v. E. Me. Med. Ctr.*, 599 F. Supp. 2d 59, 63–64 (D. Me. 2009).

24. *ArcelorMittal France v. AK Steel Corp.*, 811 F. Supp. 2d 960 (D. Del. 2011), *aff'd in part, rev'd in part*, 700 F.3d 1314 (Fed. Cir. 2012); *Bowers v. Nat'l Coll. Athletic Ass'n*, 564 F. Supp. 2d 322 (D.N.J. 2008).

25. FED. R. CIV. P. 26(a)(2)(B).

26. FED. R. CRIM. P. 16(a)(1)(G) ("at the defendant's request").

27. *Id.*

28. 509 U.S. 579 (1993).

29. *Id.* at 591–92.

30. FED. R. EVID. 702.

31. *Id.*

32. *Daubert*, 509 U.S. at 590.

33. Edward J. Imwinkelried, *The Daubert Decision: Frye Is Dead, Long Live the Federal Rules of Evidence*, 29 TRIAL 60 (Sept. 1993).

an opinion, the expert's proponent must establish that the theory or technique has been validated by sound scientific methodology such as controlled experimentation.<sup>34</sup> Simply stated, a theory or technique must be reliable in that sense to serve as a basis for expert testimony. In 1999, in *Kumho Tire Co. v. Carmichael*,<sup>35</sup> the Court expanded on *Daubert*. There the Court ruled that the general requirement for a showing of reliability applies across the board to all types of expert testimony.<sup>36</sup> Significantly, like the 1993 amendment to Civil Rule 26, Federal Evidence Rule 702 governs only expert testimony.<sup>37</sup>

A post-*Kumho* development, a 2000 amendment to Federal Rule of Evidence 701, underscored the significance of the distinction between lay and expert opinion testimony.<sup>38</sup> The drafters recognized that in order to circumvent the 1993 amendment to Rule 26 and the *Daubert* line of authority, litigators had sometimes mislabeled expert opinion as lay opinion.<sup>39</sup> To curb that abuse, the drafters added a new provision to Rule 701 governing lay opinion testimony.<sup>40</sup> The new provision states: "If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: . . . (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."<sup>41</sup> The Advisory Committee Note accompanying the 2000 amendment states:

Rule 701 has been amended to eliminate the risk that the reliability requirement set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness's testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. . . . By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson.<sup>42</sup>

These formal legal developments, the rule amendments and the Supreme Court decisions, necessitate that lower courts draw the line between lay and expert opinions. However, the Court's decisions are part of a broader trend, namely, reformulating evidentiary rules along epistemo-

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34. *Daubert*, 509 U.S. at 592-93.

35. 526 U.S. 137, 147-48 (1999).

36. *Id.* at 147.

37. FED. R. EVID. 702.

38. *Id.* at 701.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* (advisory committee's note).

logical lines.<sup>43</sup> In both *Daubert*<sup>44</sup> and *Kumho*,<sup>45</sup> the Court returned to epistemological fundamentals; the Court emphasized that to serve as a basis for admissible testimony, any expert claim must amount to “knowledge” within the meaning of that expression in Rule 702. It is true that the statute refers to “scientific, technical, or other specialized” expertise, but each adjective modifies the same noun, “knowledge.”<sup>46</sup> The *Daubert* Court stated that to qualify as reliable “knowledge,” a claim must be supported by “more than subjective belief or unsupported speculation.”<sup>47</sup> To date, most of the scholarly commentary has focused on the question of whether an expert testifying to an opinion is making a justifiable knowledge claim: The expert’s proponent must demonstrate that there is an adequate empirical warrant for the claim.<sup>48</sup> However, delimiting lay opinion knowledge claims from expert opinion knowledge claims may deepen our understanding of the latter. In both cases, the witness is advancing a knowledge claim. Drawing a line between the warrant necessary for a lay claim and the justification required for an expert claim ought to refine our understanding of the way in which both types of claims should be validated. Hence, like the formal legal developments, the emergence of this broad epistemological trend heightens the importance of establishing a border between lay and expert opinion.

The purpose of this brief essay is to explore that border. The first part of the essay discusses several possible bases for distinguishing between lay and expert opinion. Some possibilities relate to the policy rationale for admitting the two types of opinions. Others concern the opinion itself—the topic of the witness’s ultimate conclusion, the degree of specificity of the opinion, or the definiteness of the opinion. This part concludes that none of those possibilities is a satisfactory basis for distinguishing between the two types of opinions. The second part of the essay proposes an alternative epistemological basis, that is, the nature of the reasoning processes underlying the opinions. This part argues that both lay and ex-

43. Bert Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 750–52 (1994); Margaret G. Farrell, *Daubert v. Merrell Dow Pharmaceuticals, Inc.: Epistemology and Legal Process*, 15 CARDOZO L. REV. 2183, 2189–90 (1994); Edward J. Imwinkelried, *The Epistemological Trend in the Evolution of the Law of Expert Testimony: A Scrutiny at Once Broader, Narrower, and Deeper*, 47 GA. L. REV. 863, 882–85 (2013); Edward J. Imwinkelried, *Serendipitous Timing: The Coincidental Emergence of the New Brain Science and the Advent of an Epistemological Approach to Determining the Admissibility of Expert Testimony*, 62 MERCER L. REV. 959, 974–75 (2011); Edward J. Imwinkelried, *The Next Step After Daubert: Developing a Similarly Epistemological Approach to Ensuring the Reliability of Nonscientific Expert Testimony*, 15 CARDOZO L. REV. 2271, 2277–94 (1994).

44. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993).

45. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

46. FED. R. EVID. 702.

47. *Daubert*, 509 U.S. at 590.

48. See, e.g., D. Michael Risinger, *Preliminary Thoughts on a Functional Taxonomy of Expertise for the Post-Kumho World*, 31 SETON HALL L. REV. 508, 512–24 (2000); D. Michael Risinger, *Defining the “Task at Hand”: Non-Science Forensic Science After Kumho Tire Co. v. Carmichael*, 57 WASH. & LEE L. REV. 767, 776 (2000); Ronald J. Allen & Joseph S. Miller, *The Common Law Theory of Experts: Deference or Education?*, 87 NW. U. L. REV. 1131, 1138–39 (1993).

pert opinions amount to comparative judgments. The common denominator is that in both cases, the witness is comparing a generalization to a case-specific fact or facts. The differences, though, are that lay and expert witnesses derive their generalizations in radically different manners and often acquire their information about the case-specific facts in a quite different fashion. Building on part two, the third and final part of the essay explains why the epistemological differences between lay and expert opinions necessitate very different admissibility standards for the two types of opinions. The essay illustrates the differences by applying the proposed analysis to one of the modern battlegrounds for opinion evidence, testimony by experienced police officers about code words used by drug gangs.

## I. THE POSSIBLE BASES FOR DISTINGUISHING LAY OPINION FROM EXPERT OPINION

### A. THE DIFFERING POLICY RATIONALES FOR ADMITTING LAY AND EXPERT OPINIONS

In attempting to distinguish lay and expert opinions, in the first instance it may be useful to inquire why we admit the two types of opinions. There is a consensus on the basic policy rationales for accepting the two kinds of opinions.<sup>49</sup>

In the case of lay opinions, the policy justification is a necessity rationale.<sup>50</sup> The premise of the argument is the lay witness's inability to articulate all the data he or she is relying on.<sup>51</sup> If a lay witness contemplates opining about the speed of a passing car—a so-called collective fact opinion<sup>52</sup>—the witness is implicitly relying on the many other occasions when the witness has observed motor vehicles on the road. It is infeasible to expect the witness to articulate all that data and put the jurors in as good a position as the witness to draw the inference. Likewise, if a lay witness proposes opining about the handwriting style of the purported author—termed a skilled lay observer opinion<sup>53</sup>—the witness will rely on all the

49. Edward J. Imwinkelried, *The Taxonomy of Testimony Post-Kumho: Refocusing on the Bottom Lines of Reliability and Necessity*, 30 CUMB. L. REV. 185, 195 (2000).

50. KENNETH S. BROWN, 1 MCCORMICK, EVIDENCE § 11 (7th ed. 2013).

51. *Id.* at 68–71; DEL. CODE ANN. § 701(1) (2014) (when the witness cannot readily communicate, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact, without testifying in terms of inferences or opinions); FLA. STAT. ANN. § 90.701(1) (2014); Mason Ladd, *Expert Testimony*, 5 VAND. L. REV. 414, 417 (1952); *Virgin Islands v. Knight*, 989 F.2d 619, 630 (3d Cir.) (articulate), *cert. denied*, 510 U.S. 994 (1993); *United States v. Yazzie*, 976 F.2d 1252, 1255–56 (9th Cir. 1992) (describe); *United States v. Jackson*, 688 F.2d 1121 (7th Cir. 1982) (communicate), *cert. denied*, 460 U.S. 1043 (1983); *Tillman v. State*, 630 S.W.2d 5, 10 (Ark. 1982) (verbalize), *cert. denied*, 459 U.S. 1201 (1983); *People v. Fiore*, 174 Cal. Rptr. 3d 806, 823 (Cal. App. 2014) (“[A] lay witness’s opinion ‘is admissible . . . as a matter of practical necessity when the matters . . . observed are too complex or too subtle to enable [the witness] accurately to convey them to [the trial] court or jury in any other manner.’”); *Giller Indus. v. Consol. Casting Corp.*, 590 S.W.2d 818, 820 (Tex. Civ. App. 1979) (communicate).

52. BROWN, *supra* note 50, § 11.

53. *Id.* at 70–71.

prior occasions when he or she was exposed to the author's writing. Again, it is unrealistic to expect the witness to describe all earlier occasions. If the juror is to have the benefit of the witness's prior experience, the judge must accord the witness some latitude to opine and not merely recite primary facts. Thus, in these circumstances there is an element of necessity for admitting lay opinions.<sup>54</sup>

The case for admitting expert opinions is very different. The policy rationale for admitting lay opinion testimony is an element of necessity, the witness's inability to verbalize all the underlying data and put the jury in as good a position to draw the inference.<sup>55</sup> In the case of expert testimony, though, the argument is that even if the jury could be provided with all the underlying data, the lay trier of fact lacks the knowledge or skill to draw as reliable a conclusion from the data:

Suppose, for example, that the witness is a forensic pathologist . . . . Initially, the pathologist describes [in detail] the condition of the cadaver at the time it was delivered to the morgue. At the time of the delivery of the cadaver, a technician took a large number of photographs of the cadaver. The photographs depict a pink discoloration in the lower regions of the body. Between the photographs and the witness's description of the condition of the cadaver, the trier of fact has all the primary data known to the pathologist. Should that bar the introduction of the pathologist's opinion about the significance of the discoloration? No. Over objection, the trial judge would undoubtedly permit the pathologist to explain that the discoloration was evidence of postmortem lividity and make a time-of-death (TOD) estimate based on the extent of the lividity. The witness can convey the primary data about the condition of the cadaver to the trier of fact, but the trier lacks the expertise to draw a reliable inference from the data.<sup>56</sup>

Although lay opinions certainly differ from expert opinions with respect to the fundamental policy justification for admitting the two types of opinions, this difference is of little assistance to trial judges attempting to differentiate between lay and expert opinion when ruling on the admissibility of an opinion. This difference exists at a high level of abstraction. Even more to the point, the evident difference in policy rationales does not provide the trial judge with a complete analytic framework for determining the admissibility of the two types of opinion. As a matter of logic, the fact that a lay witness cannot articulate all of the primary sensory data underlying an opinion does not dictate the conclusion that the opinion is sufficiently reliable to be admissible. There is no logical necessity for positing an inverse relationship between the difficulty of articulating the data underpinning an opinion and the reliability of the opinion. Similarly, even if an expert can draw a more trustworthy inference on a subject than a layperson, neither the lay nor the expert opinion may be reliable enough

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54. Imwinkelried, *The Taxonomy of Testimony Post-Kumho*, *supra* note 49, at 195.

55. *Id.* at 194–95.

56. *Id.* at 195–96.



to meaningfully enhance the accuracy of the fact-finding process. A trial judge seeking to distinguish lay from expert opinion should certainly appreciate the differing policy rationales, but the judge needs more to be able to intelligently draw the line and make an admissibility ruling.

#### B. DIFFERING CHARACTERISTICS OF THE TWO TYPES OF OPINION

If the differing policy rationales cannot serve as a basis for drawing the line, perhaps some differing characteristic of the two types of opinions could furnish a manageable basis for a distinction. There are several candidates.

##### 1. *The Topic of the Opinion*

It might be argued that lay and expert opinions differ in that lay witnesses cannot opine on the same subjects as experts. In some cases, that argument has merit. For example, no trial judge in his or her right mind would permit a lay witness to testify to an estimated time of death (TOD) based on algor mortis, the postmortem decline of the cadaver's body temperature.<sup>57</sup> To testify on that subject, a witness would need some medical training and ideally possess the credentials of a pathologist.<sup>58</sup> Nor would a judge allow a lay witness to rest an opinion about a vehicle's speed on the measurement of the yaw marks left by the vehicle.<sup>59</sup> To venture that opinion, a witness would have to have the sort of understanding of the laws of motion familiar to physicists and accident reconstruction experts.<sup>60</sup>

Nevertheless, it is an oversimplification to assert that lay opinions are distinguishable from expert opinions because lay opinions cannot address the same topics as expert opinions. Quite to the contrary, in many cases a lay witness may express an opinion on the identical subject as an expert. For example, just as qualified mental health professionals may opine about a subject's sanity, some types of lay witnesses may do so. California Evidence Code § 870(a) states that a lay witness "may state his opinion as to the sanity of a person when . . . [t]he witness is an intimate acquaintance of the person whose sanity is in question."<sup>61</sup> At common law, the courts often dubbed these witnesses skilled lay observers as to sanity.<sup>62</sup> Likewise, just as many courts permit expert questioned document examiners (QD) to opine about the author of a writing such as a will or let-

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57. 2 PAUL C. GIANNELLI ET AL., SCIENTIFIC EVIDENCE § 19.08[a], at 277–79 (5th ed. 2012).

58. *Id.* at § 19.10[a], at 292–96.

59. *Id.* at § 27.06[b]. When a vehicle brakes, the resulting road mark is a skidmark. However, if a driver is attempting to negotiate a curve, begins to lose control, and then tries to steer through the curve, the vehicle sideslips and leaves a yaw mark. The formula for estimating speed from skidmarks differs from the formula used for estimating speed from yaw marks.

60. *Id.* at § 27.10[b].

61. CAL. EVID. CODE § 870 (2014).

62. BROWN, *supra* note 50, 11.

ter,<sup>63</sup> the courts accept lay testimony on the subject when the lay witness has substantial familiarity with the author's handwriting style.<sup>64</sup> Federal Rule of Evidence 901(b)(2) authorizes the receipt of "[a] nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation."<sup>65</sup> Even without the benefit of a statute such as 901(b)(2), at common law the courts treated such evidence as admissible skilled lay observer testimony.<sup>66</sup> The upshot is that in many instances, the courts accept both lay and expert opinions on the very same topic.

## 2. *The Specificity of the Opinion*

Perhaps it could be contended that lay and expert opinions differ in that expert opinions can be more specific than lay opinions. Again, there is a measure of truth in this assertion. As the preceding paragraph pointed out, if a lay witness is familiar with a person's baseline behavior, a judge may admit the witness's opinion that on a particular occasion the person's behavior deviated from the baseline so substantially that the person was insane.<sup>67</sup> However, a judge would not permit the lay witness to go to the length of specifically opining that the person was manic depressive.<sup>68</sup> To offer that opinion, the witness would need some credentials as a mental health expert.<sup>69</sup>

However, on closer scrutiny, the contention once again proves to be an oversimplification. Consider, for example, opinions about handwriting identification. Given the right facts, both a lay skilled observer and a questioned document examiner may opine that a certain person had authored a particular writing; the two types of experts can testify at the same level of specificity. Indeed, if the expert had access to only a limited number of authenticated exemplars of the suspected author's handwriting,<sup>70</sup> the judge would conceivably permit a lay witness to give a more specific opinion than an expert. If the expert had only a small number of exemplars to compare to the questioned document, the court might restrict the expert to opining that the author was a member of a class of persons such as arthritic individuals.<sup>71</sup> In contrast, the same judge could allow a skilled lay observer to express the opinion that the author was a particular individual.

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63. GIANNELLI ET AL., *supra* note 57, § 21.07[a].

64. FED. R. EVID. 901(b)(2).

65. *Id.*

66. BROWN, *supra* note 50, § 11.

67. *United States v. Walshe*, 526 Fed. Appx. 834, 838 (10th Cir. 2013).

68. *Id.* at 838–39.

69. GIANNELLI ET AL., *supra* note 57, § 9.11, at 608–09.

70. *Id.* § 21.02[a], at 390–91; *see also* § 21.07[d], at 459–61.

71. *Id.* § 21.02[b], at 393.

## 2. *The Degree of Definiteness of the Opinion*

At first blush, it might appear that lay opinions can be distinguished from expert opinions on the basis that all truly expert opinions can be stated to a degree of scientific certainty or at least probability. Admittedly, in many jurisdictions the traditional rule was that an expert must vouch for his or her opinion as a scientific certainty or probability.<sup>72</sup> However, even accepting the traditional rule as a given, it is fallacious to leap to either the conclusion that all expert opinions can be stated as a certainty or the conclusion that the degree of certitude of expert opinions is a characteristic that distinguishes expert from lay opinion.

To begin with, many jurisdictions have abandoned the requirement that an expert vouch for his or her opinion as a certainty or probability.<sup>73</sup> The initial inroads were cases involving expert prognoses which are necessarily speculative.<sup>74</sup> The courts then broadened the inroads. In the words of the Ohio Supreme Court,

While several decisions from this court indicated that speculative opinions by medical experts are inadmissible since they are based on possibilities and not probabilities . . . we believe that the better practice, especially in criminal cases, is to let experts testify in terms of possibility.<sup>75</sup>

The Federal Rules of Evidence do not contain any language that could reasonably bear the interpretation that it codifies an invariable requirement that expert opinions be couched as certainties or probabilities. As a general proposition, under the Federal Rules an expert opinion's lack of certainty cuts to the weight of the evidence rather than its admissibility.<sup>76</sup>

Moreover, even when most jurisdictions still followed the traditional rule, the courts did not do so because they believed that by their very nature, all expert opinions are certain. Quite the opposite is true. Instead, the courts recognized that the degree of certitude of expert opinions can vary radically. Recognizing that, the courts ruled admissible only those

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72. Glenn E. Bradford, *Dissecting Missouri's Requirement of "Reasonable Medical Certainty,"* 57 J. MO. BAR 136 (2001); Gregory Joseph, *Less than "Certain" Medical Testimony*, 14 TRIAL 51 (1978); James McElaney, *Expert Witnesses and the Federal Rules of Evidence*, 28 MERCER L. REV. 463, 477 (1977); Michael M. Martin, *The Uncertain Rule of Certainty: An Analysis and Proposal for a Federal Rule of Evidence Rule*, 20 WAYNE L. REV. 781, 782 (1974); *Medical Evidence—Sufficiency of Expert's Opinion*, 17 DEF. L. J. 181, 185–89 (1968).

73. *Cage v. City of Chi.*, 979 F. Supp. 2d 787, 809 (N.D. Ill. 2013) ("Rule 702 does not require 'that an expert's opinion testimony be expressed in terms of a reasonable scientific certainty in order to be admissible.' *Stutzman v. CRST, Inc.*, 997 F.2d 291, 296 (7th Cir. 1993) (quoting *United States v. Cyphers*, 553 F.2d 1064, 1072 (7th Cir. 1977)."); GIANNELLI ET AL., *supra* note 57, § 5.06, at 340–41 n.178 (collecting cases admitting expert opinions that were not stated in those terms).

74. Joseph, *supra* note 72, at 51–52.

75. *State v. D'Ambrosio*, 616 N.E. 2d 909 (1993). See also *In re Swine Flu Immunization Prods. Liab. Litig.*, 533 F. Supp. 567, 578 (D. Colo. 1980).

76. *In re Swine Flu*, 533 F. Supp. at 578; *Ernst v. City of Chicago*, 39 F. Supp. 3d 1005, 1015 (N.D. Ill. 2014). Of course, the indefiniteness of an opinion reduces its probative worth and could render the opinion vulnerable to an objection under Federal Rule of Evidence 403. FED. R. EVID. 403.

opinions that the expert could convincingly characterize as a certainty or probability. The courts' ruling reflected an understanding that certainty is not an inherent characteristic of an expert opinion.

Furthermore, the early courts imposed the traditional requirement for policy reasons that had nothing to do with any supposed inherent certainty of expert opinions. The courts enforced the traditional rule while the *Frye* general acceptance test was the prevailing standard for the admissibility of scientific testimony.<sup>77</sup> The principal rationale for the *Frye* test was the fear that lay jurors would ascribe undue weight to expert testimony.<sup>78</sup> In that light, it was understandable that the courts would insist that an expert had to characterize any admissible opinion as a certainty or probability:

The proponents of *Frye* believe that the jury is likely to overestimate the value of scientific evidence; the fear is that the jurors will treat any scientific opinion as dispositive even when the opinion does not deserve that much weight. Given that fear, it makes sense to limit admissible expert opinions to statements of certainty or probability; the courts should admit only opinions that in the experts' judgment, are entitled to the weight the jurors are likely to attach to the opinion.<sup>79</sup>

Thus, the traditional rule did not rest on a dubious assumption that expert opinions are inherently certain or that in that respect, they differ in kind from lay opinions. As a matter of epistemology, the degree of definiteness of any opinion depends on the extent of the warrant for the witness's knowledge claim. Simply stated, the classification of the opinion as lay or expert is irrelevant.

### C. SUMMARY

Although the Federal Rules of Evidence have been in effect for almost 40 years, the Supreme Court has not yet had an occasion to construe Federal Rule of Evidence 701 governing lay opinions. However, the Court has had several opportunities to comment on Rule 702 dealing with expert testimony. In those cases,<sup>80</sup> the Court has consistently emphasized that under Rule 702, the trial judge's gatekeeping responsibility is to en-

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77. EDWARD J. IMWINKELRIED, *THE METHODS OF ATTACKING SCIENTIFIC EVIDENCE* § 6-6[d] (5th ed. 2014).

78. GIANNELLI ET AL., *supra* note 57, § 1.06[a].

79. IMWINKELRIED, *THE METHODS OF ATTACKING SCIENTIFIC EVIDENCE*, *supra* note 77, § 6-6[d], at 6-28-29.

80. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592-98 (1993); *Joiner v. Gen. Elec.*, 522 U.S. 136 (1997); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999); *Weisgram v. Marley Co.*, 528 U.S. 440, 445 (2000).

sure that only “reliable” opinions are submitted to the jury.<sup>81</sup> In that light, the use of any of the distinctions proposed in this part would yield wrong-minded results.

Focusing exclusively on the rationale for admitting lay opinions mentioned in subpart I.A is of little help. To demonstrate that the rationale applies in a given case, the proponent of the lay opinion must show that the lay witness is unable to articulate all the underlying data.<sup>82</sup> However, that negative showing does not affirmatively guarantee the reliability of the opinion.

Likewise, none of the characteristics discussed above in subpart II.A can serve as the basis for a general rule enabling the trial judge to decide when it is permissible to admit a lay opinion. It is simply not true that lay and experts cannot render reliable opinions on the same subject. As we have seen, sometimes lay and expert witnesses can form equally reliable opinions on the identical subject; the opinions derive their reliability from different sources, but both types of opinions are nonetheless reliable. Moreover, as the questioned document hypothetical illustrated, there are situations in which a layperson can form a more specific reliable opinion than a forensic examiner. Finally, the essential distinction cannot be the definiteness of the opinion. The fundamental reliability of a purportedly definite opinion depends on its underlying warrant, not the formal classification of the opinion as lay or expert. In short, each of the potential distinctions discussed above turns out to be a cul-de-sac.

## II. A PROPOSED BASIS FOR DISTINGUISHING LAY OPINIONS FROM EXPERT OPINIONS: A FOCUS ON THE REASONING PROCESS CULMINATING IN THE OPINION

As Part I demonstrated, the proposed bases for distinguishing lay and expert opinion discussed in that part are unsatisfactory. The difference in policy rationales cannot provide the trial judge with a complete analytic framework. The proposals related to the topic and specificity of the opinion are flawed, resting on oversimplifications. For its part, the proposal based on the definiteness of the opinion misconceives the scope of and rationale for the traditional rule requiring expert opinions to be couched as certainties or probabilities. Perhaps the drafters of the 2000 amendment to Rule 701 intuited that the prior attempts to distinguish the two types of opinion had been failures. Since those attempts were dead ends, the drafters looked elsewhere. Therefore, in the last paragraph of their new Advisory Committee Note, the drafters suggested another basis:

The amendment incorporates the distinctions set forth in *State v. Brown*, 836 S.W.2d 530, 549 (1992), a case involving a former Tennessee Rule of Evidence 701, a rule that declared that the distinction

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82. Imwinkelried, *The Taxonomy of Testimony Post-Kumho*, *supra* note 49, at 197.

between lay and expert witness testimony is that lay testimony “results from a process of reasoning familiar in everyday life,” while expert testimony “results from a process of reasoning which can be mastered only by specialists in the field.” The court in *Brown* noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.<sup>83</sup>

The drafters were on the right track. Rather than focusing on a characteristic of the opinion itself—its subject, its specificity, or its definiteness—the drafters point to the process of reasoning that the witness employs to derive the opinion.<sup>84</sup> However, neither the Note nor the *Brown* opinion nor the former Tennessee rule specifies the way in which the two reasoning processes diverge.<sup>85</sup> How does the “process of reasoning” underlying a lay opinion differ from the process underlying an expert opinion?

It is submitted that the essential insight into the reasoning processes is that when any witness, lay or expert,<sup>86</sup> forms an opinion about the signifi-

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83. FED. R. EVID. 701 (advisory committee’s note).

84. *Id.*

85. *Id.*; State v. Brown, 836 S.W.2d 530, 549 (1992); TEN. R. EVID. 701.

86. It must be remembered that sometimes a testifying expert does not offer an opinion about the significance of any fact in the case. The original Advisory Committee Note to Rule 702 states:

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference.

FED. R. EVID. 702 (advisory committee’s note). That passage explains why the text of Rule 702 permits an expert to testify “in the form of an opinion or otherwise . . . .” See State v. Salazar-Mercado, 325 P.3d 996, 999 (Ariz. 2014) (without referring to the specific facts of the case, a prosecution forensic interviewer proposed testifying about child sexual abuse accommodation syndrome (CSAAS) and how child victims of sexual abuse behave; the Arizona Supreme Court rejected a defense contention that the witness’s testimony was inadmissible unless she applied the generalization to the particular facts in the case).

In some cases, the expert’s proponent may believe that it is tactically advisable for the jurors themselves to apply the general theory or technique to the facts of the case. If the jurors themselves independently draw the inference, they may attach greater weight to it. In other cases, the state of the empirical data may not allow the expert to opine about the significance of the fact or facts in the case. For instance, although many courts allow psychologists to testify about the general unreliability of eyewitness identifications, the courts balk at allowing the expert to opine that the identification in the instant case was unreliable or inaccurate. BROWN, *supra* note 50, § 12. Although the available empirical studies establish that certain factors such as the cross-racial nature of an identification can reduce the probability of an accurate identification, the researchers have not designed and conducted the further studies necessary to develop criteria for determining when a specific identification is likely to be inaccurate. *Id.* at 81–82.

In any event, if the expert testifies only about a general theory or principle without purporting to apply the theory or principle to the facts of the case, the proponent must still

cance of a fact or facts in the case, he or she is making a comparative judgment. One term of the comparison is a generalization such as the normal appearance of a particular author's handwriting style or the symptomatology of a certain disease. The other term of the comparison is a case-specific fact such as a questioned document or a set of case-specific facts such as a patient's case history. Both lay and expert witnesses reason to their opinions by comparing the case-specific fact or facts to the generalization.<sup>87</sup> However, as we shall see, the two types of witnesses differ fundamentally with respect to: (1) how they derive the generalization they rely on, and (2) how they acquire their information about the case-specific fact or facts.

#### A. LAY OPINIONS

The published opinions admitting lay opinions tend to fall into two categories: collective fact or shorthand rendition opinions and skilled lay observer opinions.<sup>88</sup> In the former category, the courts admit testimony about such subjects as a person's height, weight, intoxication, and age as well as the speed of a passing vehicle.<sup>89</sup> In the latter category, the courts allow lay witnesses to opine on such topics as the author of a particular writing or a person's sanity at a given time.<sup>90</sup>

##### 1. *Collective Fact or Shorthand Rendition Lay Opinions*

In both categories, the lay witness is deriving an opinion by making a comparison between a generalization and a case-specific fact or facts. For instance, consider a collective fact opinion. A lay witness proposes opining about a person's intoxication. The witness is drawing on a generalization about the behavior of intoxicated persons. It is assumed that in the United States, on several occasions the typical witness has observed intoxicated persons in bars, at parties, or in the home. The generalization rests largely on the witness's personal or firsthand knowledge. Strictly speaking, the generalization may not be based exclusively on such knowledge. For example, at a prior party when the witness believed that someone was drunk, another person may have remarked to the witness that she also believed that the person was intoxicated. However, for the most part the foundation for the generalization is the witness's personal observation of intoxicated individuals.

The witness forms an opinion whether the person involved in the instant case was intoxicated by comparing the generalization to the case-specific fact or facts. Here, the witness's personal observation of the conduct of that person at the time in question—for instance, immediately

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lay a foundation validating the general theory or technique. FED. R. EVID. 702(c); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589–90 (1993).

87. *BROWN*, *supra* note 50, § 11.

88. *Id.* at 70.

89. *Id.*

90. *Id.* at 70–71.

after the person struck and killed a pedestrian—constitutes the case-specific information. Under Federal Rules 602 and 701(a),<sup>91</sup> the witness must gain his or her information about the case-specific facts through firsthand knowledge.

## 2. Skilled Lay Observer Opinions

Now consider a skilled lay observer opinion. In this category the lay witness might contemplate opining about the identity of the author of a writing or a person's sanity at a particular time.<sup>92</sup> Although there are some superficial differences between collective fact and skilled lay observer opinions, in the final analysis both types of lay opinions are derived by the same reasoning process. Once again, the witness relies on a generalization. The generalization could be the normal appearance of a particular author's handwriting style or a particular person's baseline, ordinary behavior. As in the case of collective fact opinions, the lay witness's generalization rests exclusively or primarily on the witness's personal knowledge.<sup>93</sup> The witness has had prior, repeated opportunities for observation.<sup>94</sup> The witness has seen the person sign numerous documents,<sup>95</sup> or the witness often associates with a person<sup>96</sup> and is therefore familiar with the person's behavioral baseline. As in the case of collective fact opinions, the generalization might rest to an extent on sources other than the witness's firsthand knowledge. Thus, even if a secretary did not see his employer sign a prior writing, she might have handed him the writing and told him that she had just signed it; or while a witness was observing a person's conduct on a prior occasion, an acquaintance of the person might have remarked to the witness that the person's conduct was "normal" or "typical."<sup>97</sup> However, in the main, in forming the generalization, the witness relies on personal observation.<sup>98</sup>

Like a lay witness testifying to a collective fact opinion, a lay witness offering a skilled lay observer opinion derives the opinion by comparing the generalization to a case-specific fact or facts.<sup>99</sup> In a handwriting case, the case-specific fact is the questioned document presented to the lay witness on the stand.<sup>100</sup> In a sanity case, the case-specific facts are the witness's observations of the person's aberrant behavior at the time in question.<sup>101</sup> In both situations, the witness acquires personal knowledge of the case-specific fact or facts: The witness can examine the questioned

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91. FED. R. EVID. 602, 701.

92. BROWN, *supra* note 50, § 11, 70–71.

93. Imwinkelried, *The Taxonomy of Testimony Post-Kumho*, *supra* note 49, at 196–98.

94. *Id.* at 198.

95. FED. R. EVID. 901(b)(2) ("familiarity").

96. CAL. EVID. CODE § 870(a) ("[A]n intimate acquaintance of the person whose sanity is in question.").

97. Imwinkelried, *The Taxonomy of Testimony Post-Kumho*, *supra* note 49, at 198.

98. *Id.* at 194–200.

99. *Id.*

100. *Id.*

101. *Id.*



document exhibit on the stand, and the witness personally perceived the person's allegedly insane behavior.<sup>102</sup>

## B. EXPERT OPINIONS

In one respect, the reasoning process underlying an expert opinion is identical to the reasoning process supporting lay opinions. Like lay opinions, expert opinions are derived by comparing a generalization to a case-specific fact or facts.<sup>103</sup> When a mental health expert opines whether a patient suffers from a certain mental illness, the expert compares the symptoms in the patient's case history to recognized diagnostic criteria such as the standards set out in the latest edition of the American Psychiatric Association's *Diagnostic and Statistical Manual*.<sup>104</sup> Similarly, when an accident reconstruction expert forms an opinion about the pre-collision speed of a vehicle, the expert compares the norms for skid marks and yaw marks with the measurements taken at the collision scene.<sup>105</sup> As in the case of lay opinions, the essence of the expert's reasoning process is a comparative judgment.<sup>106</sup> However, there are fundamental distinctions between the two terms of the comparison in lay and expert reasoning processes.<sup>107</sup>

### 1. *The Derivation of the Generalization That the Expert Relies On*

Of course, it is possible for a scientist to personally design and conduct a controlled experiment that validates the hypothesis or generalization that the scientist relies on as the basis for an opinion.<sup>108</sup> However, a contemporary scientist is almost always at least implicitly relying on prior empirical studies and discoveries; the contemporary scientist builds on prior discoveries by earlier researchers in the field.<sup>109</sup> To paraphrase Sir Isaac Newton, modern experts stand on the shoulders of the giants who preceded them.<sup>110</sup> A contemporary physicist need not duplicate the research conducted by Fermi and Oppenheimer before utilizing a generalization derived from their research.<sup>111</sup> Although a lay witness must rely on a generalization resting exclusively or primarily on his or her personal knowledge,<sup>112</sup> an expert witness is likely to draw on a wide range of

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102. *Id.*

103. *Id.*

104. AM. PSYCHIATRIC ASS'N, *DIAGNOSTIC AND STATISTICAL MANUAL V* (5th ed. 2013).

105. GIANNELLI ET AL., *supra* note 57, § 27.06[a]–[b].

106. *See id.* § 5.05.

107. *See infra* notes 74–96 and accompanying text.

108. *See* GIANNELLI ET AL., *supra* note 57, § 5.08.

109. Edward J. Imwinkelried, *The "Bases" of Expert Testimony: The Syllogistic Structure of Scientific Testimony*, 67 N.C. L. REV. 1, 4 (1988).

110. ROBERT KING MERTON, *ON THE SHOULDERS OF GIANTS* 9 (1993), *quoted in* ERNEST E. SNYDER, *HISTORY OF THE PHYSICAL SCIENCES* 28 (1969).

111. Imwinkelried, *The "Bases" of Expert Testimony*, *supra* note 109, at 9.

112. *See* FED. R. EVID. 701.

sources,<sup>113</sup> including “much hearsay-lectures by his [or her] teachers, statements in textbooks, reports of experiments and experiences of others in the same field.”<sup>114</sup> In other words, in formulating the generalization, the expert relies on vicarious as well as personal experience.<sup>115</sup> In *Daubert*, Justice Blackmun recognized this distinction; he stated that while lay opinions rest on “firsthand knowledge or observation,” experts draw on “the knowledge and experience of his [or her] discipline.”<sup>116</sup> In sum, although the reasoning process underlying both lay and expert opinions entails a generalization, expert witnesses derive their generalization in a very different manner than lay witnesses.<sup>117</sup>

## 2. *The Manner in Which the Expert Gains Information About the Case-Specific Fact or Facts to Be Evaluated*

We have just seen that while both lay and expert opinions rest on a comparison between a generalization and a case-specific fact or facts, lay and expert opinions differ with respect to one term of the comparison, namely, the generalization the witness relies on.<sup>118</sup> The two kinds of opinions also differ with regard to the second term of the comparison, the case-specific fact or facts. Although lay witnesses must gain their information about the case-specific facts solely through personal observation,<sup>119</sup> the proponent of an expert opinion has other options.<sup>120</sup>

The governing statute for experts is Federal Rule of Evidence 703.<sup>121</sup> In pertinent part, restyled Rule 703 reads:

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.<sup>122</sup>

In effect, Federal Rule of Evidence 702 controls the expert witness’s major premise,<sup>123</sup> the general theory or technique that the expert relies on in forming his or her opinion.<sup>124</sup> In contrast, Rule 703 governs the expert’s minor premise,<sup>125</sup> that is, the way in which he or she gains information about the case-specific fact or facts that the theory or technique will be

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113. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999); Scieszinski, *supra* note 14, at 1182.

114. JOHN MAGUIRE, EVIDENCE: COMMON SENSE AND COMMON LAW 29 (1947).

115. Imwinkelried, *The Taxonomy of Testimony Post-Kumho*, *supra* note 49, at 203.

116. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993).

117. See *id.*

118. See *id.*

119. See FED. R. EVID. 701.

120. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999).

121. FED. R. EVID. 703.

122. FED. R. EVID. 703.

123. FED. R. EVID. 702.

124. Imwinkelried, *The “Bases” of Expert Testimony*, *supra* note 109.

125. Edward J. Imwinkelried, *Developing a Coherent Theory of the Structure of Federal Rule of Evidence 703*, 47 MERCER L. REV. 447, 454 (1996); Edward J. Imwinkelried, *The Meaning of “Facts or Data” in Federal Rule of Evidence 703: The Significance of the Su-*

applied to. As Part II.A demonstrated, a lay witness venturing an opinion must possess personal knowledge of the case-specific fact or facts.<sup>126</sup> However, under Rule 703, there are three distinct ways in which an expert may obtain such information for his or her analysis.<sup>127</sup>

At first, it might seem curious that experts should be permitted more latitude in this respect than lay witnesses. As we have seen, it is sensible to allow experts greater freedom in formulating their generalizations.<sup>128</sup> Although it is feasible for a lay witness to rely solely or primarily on personal knowledge in developing a generalization about a particular person's handwriting style, it would be silly to require a nuclear physicist to rely exclusively on experiments she had personally conducted.<sup>129</sup> However, the focus now is the expert's minor premise, their case-specific information rather than their generalization.<sup>130</sup> Nevertheless, it is defensible to accord expert witnesses greater latitude here as well.<sup>131</sup> As Part I.A explains, the policy justification for admitting expert opinions is the expert's possession of a knowledge or skill enabling the expert to draw a more reliable inference than a layperson.<sup>132</sup> That is the expert's unique contribution to the fact-finding process.<sup>133</sup> At early common law, as in the case of lay witnesses, courts insisted that experts gain their case-specific information through personal knowledge.<sup>134</sup> Since Rule 703 includes the language, "personally observed," it is still permissible for experts to rely on personally acquired information.<sup>135</sup> Moreover, as a matter of trial advocacy, jurors are often more impressed by an expert who possesses firsthand knowledge.<sup>136</sup> However, the courts quickly realized that they could capitalize on the expert's unique ability to enhance fact-finding even when the expert lacks personal knowledge.<sup>137</sup> If the case-specific facts are established by other means, the expert is still in a better position to analyze their significance than either the lay judge or the lay jurors.<sup>138</sup> Ultimately, the courts concluded that it is silly to deny the legal system expert insights merely because the expert has not personally observed the patient's wounds or witnessed the traffic accident.<sup>139</sup>

Once the courts reached that conclusion, they ruled that an expert could base an opinion on either personal knowledge of the case-specific

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*preme Court's Decision to Rely on Federal Rule 702 in Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 54 MD. L. REV. 352, 361 (1995).

126. *See* FED. R. EVID. 701.

127. BROWN, *supra* note 50, §§ 14–16.

128. Imwinkelried, *The "Bases" of Expert Testimony*, *supra* note 109.

129. *See id.*

130. *See id.* at 5.

131.

132. GIANNELLI ET AL., *supra* note 57, § 5.02.

133. *See id.*

134. BROWN, *supra* note 50, §§ 14–16.

135. FED. R. EVID. 703.

136. *See id.*

137. BROWN, *supra* note 50, §§ 14–16.

138. *See id.*

139. *See* FED. R. EVID. 703.

facts or an hypothesis.<sup>140</sup> They fashioned the so-called “hypothetical question technique.”<sup>141</sup> In this technique, before calling the expert to the stand, the expert’s proponent ordinarily calls lay witnesses to testify about the case-specific fact or facts that the expert will apply the theory or technique to.<sup>142</sup> These lay witnesses present admissible evidence of facts A and B. When the proponent subsequently calls the expert, before eliciting the opinion, the proponent resorts to the following formula: “Doctor, I want you to assume the truth of facts A and B. Assuming those facts, can you form an opinion, to a reasonable degree of medical probability, about the cause of Ms. Montoya’s illness?”<sup>143</sup>

If the expert answers in the affirmative, the judge admits the opinion; but in the final jury charge, the judge instructs the jurors that they should disregard the opinion if they disbelieve the lay testimony about A and B.<sup>144</sup> Suppose, for example, that the plaintiff in a personal injury action retains the world’s leading authority on the plaintiff’s illness. However, the doctor not only practices on the other side of the country; the doctor also has such a busy schedule that it is impossible for her to fly to the site of trial early and personally examine the plaintiff. Nevertheless, by allowing a hypothetical question, the legal system can gain the benefit of the insight of the pre-eminent authority on the illness in question. The language of Rule 703, information “the expert has been made aware of,”<sup>145</sup> can be construed as permitting use of the hypothetical question. The Advisory Committee Note to Rule 703 expressly states that the drafters intended to allow litigants to continue to resort to this technique.<sup>146</sup>

Before the enactment of the Federal Rules of Evidence in 1975, the common law limited the allowable means by which experts could gain their information about the case-specific facts: The expert had to have personal knowledge of the facts, or the expert’s proponent had to employ a hypothetical question, necessitating independent, admissible evidence of the assumed facts.<sup>147</sup> However, Rule 703 introduced an innovative third option.<sup>148</sup> While the hypothetical question requires the prior presentation of admissible evidence of the assumed facts, the second sentence of Rule 703 provides that “[i]f experts in the particular field would rea-

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140. *Id.*

141. BROWN, *supra* note 50, § 15.

142. In most jurisdictions, the trial judge has discretion whether to permit the expert’s proponent to elicit the witness’s opinion before calling the lay witnesses to lay the factual predicate for the opinion. *See* FED. R. EVID. 611(a). However, judges are usually reluctant to exercise their discretion to allow the proponent to do so. If the proponent fails to later present admissible testimony of the assumed facts, the trial judge may have to grant a motion to strike the expert’s opinion and instruct the jury to disregard the opinion. If the judge concludes that it is unrealistic to believe that the jury will be able and willing to follow the curative instruction, the judge may be forced to declare a mistrial in the case.

143. BROWN, *supra* note 50, § 15.

144. *See, e.g.,* Pa. Suggested Standard Criminal Jury Instructions 4.10B.

145. FED. R. EVID. 703.

146. FED. R. EVID. 703 (advisory committee’s note).

147. BROWN, *supra* note 50, §§ 14–15.

148. *See* FED. R. EVID. 703.

sonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.”<sup>149</sup> That language created the possibility of the expert’s reliance on out-of-court, “secondhand”<sup>150</sup> reports that would otherwise be inadmissible under the hearsay rule. The Advisory Committee note to Rule 703 explains:

The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians, and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes.<sup>151</sup>

The upshot is that while even today a lay witness venturing an opinion must have personal knowledge of the case-specific fact or facts, under Rule 703 an expert witness opining on the same subject may rely on either personal knowledge, or a hypothetical question, or a secondhand report.<sup>152</sup>

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149. FED. R. EVID. 703.

150. BROWN, *supra* note 50, § 15.

151. FED. R. EVID. 703 (advisory committee’s note). Since the enactment of Rule 703, the prevailing wisdom has been that secondhand reports are admitted as non-hearsay. BROWN, *supra* note 50, § 15; Edward J. Imwinkelried, *The Gordian Knot of the Treatment of Secondhand Facts Under Federal Rule of Evidence 703 Governing the Admissibility of Expert Opinions: Another Conflict Between Logic and Law*, 3 DENV. U. L. REV. 1 (2013). The conventional view is that under Federal Rule 801(c) the report is logically relevant for the non-hearsay purpose of showing the effect on the state of mind of the hearer or reader: The expert’s receipt of the report shows that the expert’s opinion is better founded and more trustworthy. Under Federal Rule 105, upon request the judge instructs the jury that they may consider the secondhand report only for the limited purpose of evaluating the soundness of the expert’s reasoning. However, in 2012 in *Williams v. Illinois*, 132 S. Ct. 2221, 2234 (2012), five justices—Justice Thomas in concurrence and four dissenters led by Justice Kagan—forcefully stated their view that when the expert’s opinion is conditioned on such secondhand reports, the jury must necessarily treat the reports as substantive proof in order to accept the opinion. On the one hand, the statements by the five justices are technically dicta; a different five-justice majority—the plurality and Justice Thomas—affirmed the conviction on an entirely different theory. On the other hand, when five Supreme Court justices declare a view as strongly as these five justices did, lower court judges tend to sit up and pay attention. It remains to be seen whether the five justices’ views will prompt lower courts to abandon the conventional wisdom.

152. See FED. R. EVID. 701; FED. R. EVID. 703.

### III. USING THE DIFFERENCES IN REASONING PROCESSES TO DIFFERENTIATE BETWEEN LAY AND EXPERT OPINION AND TO DETERMINE THE ADMISSIBILITY OF THE TWO TYPES OF OPINIONS

Part I.A rejected the argument that a trial judge can adequately distinguish between lay and expert opinion merely by considering the differing policy rationales for admitting the two types of opinions.<sup>153</sup> That part argued that without more, a consideration of the different policy rationales does not give the trial judge a complete analytic framework for drawing the line on the facts of a concrete case.<sup>154</sup> Part II contended that to draw that line, the judge should instead focus on the differences between the reasoning processes employed by lay and expert witnesses venturing opinions.<sup>155</sup> If Part II's contention is correct, examining those differences should enable trial judges to differentiate between the two kinds of opinion and assist the judge in determining the admissibility of the two types of opinions.<sup>156</sup> The objective of Part III is to demonstrate that a focus on the differences in reasoning processes has the analytic power to do so.

#### A. A DESCRIPTION OF THE PROPOSED ANALYTIC FRAMEWORK

As the Introduction noted, in the last two decades several developments have given proponents of opinions a strong motivation to classify the opinion as lay rather than expert.<sup>157</sup> As we have seen, if the opinion is lay in nature, Federal Rule of Civil Procedure 26's mandate for an expert report is inapplicable.<sup>158</sup> The litigant may offer the lay opinion at trial even though the litigant has not provided the opposition with a report or, for that matter, given the opposition any special notice of the intent to offer an opinion.<sup>159</sup> Furthermore, if the litigant can persuade the judge to categorize the opinion as lay, Federal Rule of Evidence 702 and *Daubert*'s mandate for a showing of empirical reliability do not come into play.<sup>160</sup> In short, the litigant has strong procedural and evidentiary incentives to argue that the opinion is lay rather than expert. How should the trial judge decide whether to accept that argument? Given the tenor of the litigant's argument, before inquiring whether the witness's conclusion qualifies as an expert opinion, the judge must first determine whether the conclusion is admissible as a lay opinion under Federal Rule 701.<sup>161</sup>

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153. *See supra* Part I.A.

154. *See supra* Part I.A.

155. *See supra* Part II.

156. *See supra* Part II.

157. *See supra* Introduction.

158. *See* FED. R. CIV. P. 26(a)(2).

159. *See id.*

160. *See* FED. R. EVID. 701; *Daubert v. Merrel Dow Pharm., Inc.*, 509 U.S. 579, 597-98 (1993).

161. *See* FED. R. EVID. 701.

### 1. *Lay Opinion Testimony*

Given the analysis in Part II, when the litigant offers the testimony as a lay opinion, it is submitted that the trial judge ought to engage in the following sequence of analysis.

Initially, the judge should identify both the generalization the lay witness is relying on and the case-specific fact or facts that the witness will employ the generalization to evaluate. In some cases, the judge may have to force the witness's proponent to identify one or both of the terms of the comparison.<sup>162</sup> Of course, the proponent has the burden of convincing the judge that the opinion is admissible. If the proponent cannot or does not clarify the terms of the comparison for the trial judge, the judge ought to exclude the opinion.

Assuming that the judge can identify the generalization, the judge should scrutinize the generalization in two respects. First, the judge must determine whether the generalization rests exclusively, or at least primarily, on the witness's firsthand knowledge such as personal observations of a particular person's handwriting or baseline behavior.<sup>163</sup> If a significant part of the basis for the generalization consists of out-of-court reports conveyed to the witness, the opinion can be admitted only as expert opinion.<sup>164</sup> Second, even if the generalization is based primarily on the witness's personal knowledge, the judge must decide whether, as a matter of logic, the basis is extensive enough to support the generalization.<sup>165</sup> Under California Evidence Code § 870(a), if the proponent offers a lay opinion about a person's sanity, it is not enough to establish that the witness was a passing acquaintance of the person; rather, the statute demands proof that the witness was "an intimate acquaintance"<sup>166</sup> of the person. By the same token, according to Federal Rule of Evidence 901(b)(2), it is not enough that a lay witness has had some exposure to a claimed author's handwriting; the statute demands a showing of the witness's "familiarity"<sup>167</sup> with the person's handwriting style. The Advisory Committee Note to the statute indicates that the judge must determine whether the extent of the witness's familiarity is "sufficient."<sup>168</sup> At modern common law, a trial judge has discretion to conclude that the number of the witness's prior observations is so small and the support for the generalization so skimpy that the opinion based on the generalization is inadmissible.<sup>169</sup>

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162. JOSEPH M. McLAUGHLIN, EVIDENCE § 701.03(1) (2d ed. 2014).

163. *See* FED. R. EVID. 701.

164. *See id.*

165. *See* McLAUGHLIN, *supra* note 162.

166. CAL. EVID. CODE § 870 (2006).

167. FED. R. EVID. 901(b)(2); *United States v. Apperson*, 441 F.3d 1162, 1200–01 (10th Cir. 2006) ("[B]ased upon his long-standing association with Pickard, he was familiar with his handwriting.").

168. FED. R. EVID. 901(b)(2) (advisory committee's note).

169. BROWN, *supra* note 50, § 223.

Turning to the other term of the comparison, the judge must also find that the lay witness has personal knowledge of the case-specific fact or facts the witness is opining about.<sup>170</sup> If the opinion is lay in character, the witness must satisfy the requirement for firsthand knowledge prescribed by Rules 602<sup>171</sup> and 701(a).<sup>172</sup> If the witness's proponent invites the witness to assume a fact that another witness has testified to, the proponent has to rely on Rule 703; but 703 applies only when the witness qualifies as an expert.<sup>173</sup> By parity of reasoning, if the witness proposes relying on a secondhand report, again the proponent must invoke Rule 703, but that is permissible only when the witness is an expert.<sup>174</sup>

If the proponent can surmount all three hurdles, the testimony constitutes a lay opinion under Rule 701.<sup>175</sup> More importantly for the proponent, the testimony is admissible under Rule 701.<sup>176</sup> However, when the proponent fails to satisfy even one of the three requirements, the opinion is admissible only if the testimony qualifies as expert testimony.<sup>177</sup> As the Introduction noted, if the judge characterizes the testimony in that fashion, the characterization will have major procedural and evidentiary consequences.<sup>178</sup> If the opinion is expert in nature, the expert's proponent should have filed an expert report satisfying Federal Rule of Civil Procedure 26.<sup>179</sup> If the proponent neglected to do so, as a discovery sanction, the trial judge will probably bar the testimony.<sup>180</sup> Quite apart from the procedural issue, the opinion is admissible only if the testimony passes muster under Rules 702 and 703 governing expert testimony.<sup>181</sup>

## 2. *Expert Opinion Testimony*

To decide whether the testimony can run the gauntlet of Rules 702 and 703, the trial judge should use the following sequence of analysis. As will soon be evident, there are striking parallels between this sequence and the sequence appropriate for lay opinion testimony. However, at several steps in the sequence, the fundamental differences between the reasoning processes underlying lay and expert opinions necessitate a different analysis than the judge conducts for lay opinions.

As in the case of lay opinion testimony, at the outset the judge should force the expert and the expert's proponent to identify both the generalization the expert proposes relying on and the case-specific facts or facts

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170. See FED. R. EVID. 701.

171. FED. R. EVID. 602.

172. FED. R. EVID. 701.

173. FED. R. EVID. 703.

174. *Id.*

175. See FED. R. EVID. 701.

176. See *id.*

177. See *id.*

178. See *supra* Introduction.

179. See FED. R. CIV. P. 26(a)(2)(A).

180. See *id.*

181. See *id.*



the expert will apply the generalization to.<sup>182</sup> In many cases, rather than forthrightly identifying the generalization, the expert attempts to hide behind the conclusory assertion that he or she is relying on their “education [and] experience.”<sup>183</sup> However, in both *Joiner*<sup>184</sup> in 1997 and *Kumho*<sup>185</sup> in 1999, the Supreme Court cautioned trial judges against accepting such *ipse dixit* assertions at face value. As the latest edition of one leading treatise states,

It is certainly unacceptable for the expert to rely on a proposition that is literally ineffable. An ineffable notion might be acceptable mysticism at a meeting of the Jedi Council, but it does not qualify as acceptable expertise [in court]. It is also clear that it is not enough for the witness to assert in conclusory fashion that she is relying on her general “expertise,” “knowledge,” or “education.” Those considerations can qualify the witness as an expert, but they do not speak to the validity of the expert’s theory or technique. To provide a useful insight, the witness must identify a more specific technique or theory. Otherwise, the witness is venturing nothing more than a guess.<sup>186</sup>

The next step in the analysis of an expert opinion parallels the second step in the analysis for a lay opinion. Here too the judge must scrutinize the generalization, the theory or technique that the expert contemplates relying on, to evaluate the case-specific data.<sup>187</sup> In one respect, at this stage in the analysis, the proponent of an expert opinion has greater latitude than the proponent of a lay opinion. As we have seen, under Rules 602 and 701 the proponent must demonstrate that the lay witness’s generalization is based solely or primarily on the witness’s personal knowledge.<sup>188</sup> In virtually every case, an expert will draw on out-of-court statements by third parties such as prior researchers to validate the generalization.<sup>189</sup> However, the hearsay rule does not preclude the proponent from relying on hearsay when the proponent is laying the foundation for the admissibility of an expert opinion.<sup>190</sup> In *Daubert*,<sup>191</sup> Justice Blackmun expressly stated that Federal Rule of Evidence 104(a) prescribes the preliminary fact-finding procedure for the trial judge’s ruling on the admissibility of expert testimony. The last sentence of restyled Rule 104(a) reads: “In so deciding, the court is not bound by evidence rules, except those on

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182. See FED. R. EVID. 702.

183. See *id.*

184. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

185. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999).

186. BROWN, *supra* note 50, § 13; see also *State Farm Fire & Cas. v. Electrolux Home Prods.*, 980 F. Supp. 2d 1031, 1045 (N.D. Ind. 2013) (“[A]n expert ‘who invokes my expertise rather than analytic strategies widely used by specialists is not an expert as Rule 702 defines that term.’”).

187. See FED. R. EVID. 702.

188. See FED. R. EVID. 602; FED. R. EVID. 701.

189. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993).

190. See *id.* at 595.

191. *Id.* at 592.

privilege.”<sup>192</sup> At first, that sentence may appear heretical—an evidence code provision stating that a litigant need not comply with technical evidentiary rules. However, the provision is sensible. As the Advisory Committee Note to Rule 104 explains,<sup>193</sup> the widespread assumption is that the common law evolved exclusionary rules to compensate for lay jurors’ supposedly limited competence to critically assess certain types of evidence such as hearsay. When Rule 104(a) applies, the decision is being made by the judge, not the jury.<sup>194</sup> For that matter, the judge might make the decision at a pretrial *in limine* hearing before a jury has even been selected.<sup>195</sup> Hence, it is justifiable to relieve the proponent from the obligation to satisfy technical evidentiary rules in this setting.

However, in other respects the proponent of an expert opinion faces a rigorous standard. In 2000, reflecting back on its prior decisions in *Daubert*, *Joiner*, and *Kumho*, the Supreme Court observed that the *Daubert* line of authority has erected an “exacting” standard of reliability.<sup>196</sup> There are several senses in which that observation is correct. To begin with, it is not enough for the proponent to point to the “global” validity of the expert’s field or discipline.<sup>197</sup> Rather, the proponent must establish the empirical validity of the specific theory or technique (the precise generalization) that the expert intends to utilize.<sup>198</sup> Next, to validate the generalization, the proponent must present substantial empirical data and reasoning.<sup>199</sup> The *Joiner* Court assigned the trial judges the responsibility of inquiring whether there is too great an “analytical gap” between scant, anecdotal evidence and an expert’s broad conclusion that a theory or technique is valid.<sup>200</sup> Finally, even when the proponent can point to a quantitatively impressive body of prior research, under *Daubert* the judge must make a qualitative assessment whether the research “fit[s]” the case-specific facts in the pending trial.<sup>201</sup> *Joiner*<sup>202</sup> is a case in point. There the plaintiffs marshalled a number of epidemiological studies.<sup>203</sup> However, there were several, marked differences between the

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192. FED. R. EVID. 104.

193. FED. R. EVID. 104(a) (advisory committee’s note).

194. *Id.*

195. *Id.*

196. *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).

197. *Risinger, Defining the “Task at Hand”*, *supra* note 48, at 767.

198. *United States v. Fujii*, 152 F. Supp. 2d 939 (N.D. Ill. 2000) (although some techniques in the broad field of questioned document examination may be valid, the proponent failed to validate the technique that the expert used to identify the author of a document written in Japanese handprinting); *see also* *United States v. Hermanek*, 289 F.3d 1076, 1093 (9th Cir. 2002) (“Neither the government’s offer of proof nor the qualifications of Broderick on the stand established that his interpretations of new words and phrases as references to cocaine were supported by reliable methods.”).

199. *See* *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

200. *Id.*; *Krause v. CSX Transp.*, 984 F. Supp. 2d 62, 76 (N.D.N.Y. 2013) (“[W]hen an expert opinion is based on data, methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony.”).

201. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993).

202. *See Joiner*, 522 U.S. at 143-44.

203. *See id.*

parameters of the studies and the case-specific facts: The decedent was a human being while the subjects in the studies were mice; the decedent was an adult while the subject mice were infants; the decedent had dermal exposure to the chemical while the mice were directly injected; relatively speaking, the mice received a much larger dosage than the decedent; and the decedent and the mice developed different types of cancers.<sup>204</sup> The studies may have been numerous, but they did not “fit” the facts in *Joiner*.<sup>205</sup>

The final step in the analytic framework for expert opinions is also analogous to the last step in the sequence of analysis for lay opinions. Turning to the second term of the comparison, the trial judge must determine whether the expert has acceptable sources for his or her knowledge of the case-specific facts.<sup>206</sup> We have seen that Rule 104(a) permits an expert to draw on hearsay sources to validate his or her generalization—a freedom denied lay witnesses.<sup>207</sup> Likewise, Rule 703 allows an expert to rely on a broader range of sources for his or her information about the case-specific facts than the expert’s lay counterpart.<sup>208</sup> Like a lay witness, an expert may rely on personal knowledge—the emergency room physician may have personally examined the plaintiff’s post-collision wounds.<sup>209</sup> However, unlike the lay witness, the expert is not strictly confined to personally observed facts under Rule 703.<sup>210</sup> Alternatively, the expert may respond to a hypothetical question—but only if the expert’s proponent calls other witnesses to present admissible evidence of the truth of all the elements of the hypothesis.<sup>211</sup> Finally, the expert may even rely on inadmissible secondhand reports—but, again, only if the expert’s proponent establishes that it is a reasonable (customary) practice in the expert’s specialty to consider such reports.<sup>212</sup>

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204. *See id.*

205. *See id.* at 151 (Stevens, J., dissenting).

206. *See* FED. R. EVID. 702.

207. *See* FED. R. EVID. 104.

208. *See* FED. R. EVID. 703.

209. *See id.*

210. *See id.*

211. *See id.*

212. Federal Rule of Evidence 703 allows the expert to do so when “experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.” FED. R. EVID. 703. At one time, a number of courts construed “reasonably” as if it were synonymous with “customarily.” *In re Japanese Elec. Prod. Antitrust Litig.*, 723 F.2d 238, 275–79 (3d Cir. 1983), *cert. denied sub nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1985). Thus, if the trial judge found that it was a specialty’s routine practice to consider a particular type of data under Rule 104(a), the judge had to allow the expert to rely on that type of information even though the judge might have grave reservations about the trustworthiness of data from that source. However, today the prevailing view is that even if the experts in a field routinely consider a particular type of data, the trial judge has a residual discretion to decide that it is objectively unreasonable to base an opinion on that kind of data. *In re Paoli R.R. Yard Pcb Litig.*, 35 F.3d 717, 748 (3d Cir. 1994); *In re “Agent Orange” Prod. Liab. Litig.*, 611 F. Supp. 1223, 1243–45 (E.D.N.Y. 1985); Ronald L. Carlson, *Policing the Bases of Modern Expert Testimony*, 39 VAND. L. REV. 577, 578–79 (1986).

As in the case of lay opinion testimony, the proponent of an expert opinion must overcome all three hurdles to justify admitting the opinion. If the proponent falls short of meeting any hurdle—the expert fails to specify the theory or technique (the generalization) he or she is relying on, the proponent cannot validate the generalization under Rule 702 and the *Daubert* line of precedent, or the expert’s sources for the case-specific facts do not satisfy Rule 703—the judge should exclude the opinion. If the conclusion does not qualify as lay or expert opinion, the opinion is completely inadmissible.

B. AN ILLUSTRATION OF THE APPLICATION OF THE PROPOSED  
ANALYTIC FRAMEWORK: POLICE OFFICERS’ OPINION  
TESTIMONY ABOUT THE MEANING OF  
GANG CODE WORDS

One of the hottest battlegrounds in Evidence law today is the controversy over the admissibility of police officers’ testimony about the meaning of terms in conversations between co-conspirators.<sup>213</sup> Suppose, for example, that during its case-in-chief, after laying a proper authentication foundation<sup>214</sup> the prosecution introduces an audio recording of a meeting between two alleged drug traffickers, including the accused in the pending case. On the recording, the accused is heard to assure the other alleged conspirator that he, the defendant, can deliver “the cake [he] promised.” The defense contends that the defendant meant “cake” in the ordinary, innocent, lawful sense. However, after introducing the recording, the prosecution calls a police officer prepared to testify that “cake” meant crack cocaine. Preliminarily, the officer testifies only that she has been a police officer, assigned to the drug detail, for the past three years. When the prosecution attempts to elicit the officer’s opinion that “cake” was a reference to crack cocaine, the defense objects on two grounds. First, the defense counsel states that the opinion constitutes expert testimony and that the prosecution neglected to provide the defense with a report detailing the proposed testimony. The defense counsel urges the trial judge to bar the opinion as a discovery sanction. Second, reiterating that the opinion amounts to expert testimony, the defense counsel asserts

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213. See, e.g., *United States v. Holt*, 777 F.3d 1234, 1265-66 (11th Cir. 2015); *United States v. Vera*, 770 F.3d 1232, 1242-43 (9th Cir. 2014); *United States v. Kamahale*, 748 F.3d 984, 994 (10th Cir. 2014); *United States v. Akins*, 746 F.3d 590 (5th Cir. 2014), *cert. denied sub nom.* *Perkins v. United States*, 135 S.Ct. 189 (2014); *United States v. Are*, 590 F.3d 499, 512 (7th Cir. 2009) (“This circuit has routinely upheld the admission of expert testimony from law enforcement purporting to translate ‘code words’ used by conspirators during intercepted phone calls.”); *United States v. Gibbs*, 190 F.3d 188, 211-12 (3rd Cir. 1999); Brian Gallini, *To Serve and Protect? Officers as Expert Witnesses in Federal Drug Prosecutions*, 19 GEO. MASON L. REV. 363, 363 (2012); Joelle Anne Moreno, *What Happens When Dirty Harry Becomes an (Expert) Witness for the Prosecution?*, 79 TULANE L. REV. 1, 5 (2004); Scieszinski, *supra* note 14, at 1161; see also Ralph V. Seep, *Admissibility of Expert Evidence Concerning the Meaning of Narcotics Code Language in Federal Prosecution for Narcotic Dealing—Modern Cases*, 104 A.L.R. FED. 230 (1991). See also *United States v. Prange*, 771 F.3d 17 (1st Cir. 2014).

214. FED. R. EVID. 901.

that the prosecution has not laid a sufficient foundation to satisfy Federal Rule 702 and *Daubert*. The prosecution counters that both defense objections are meritless, since the testimony is “mere lay opinion testimony.” How should the trial judge resolve the issues posed by the objection?

Rather than endorsing a categorical view that such testimony always or never qualifies as lay testimony, the judge should dissect the witness’s reasoning process. Consider the analysis in two variations of the state of the record.

### 1. *Police Officer A*

The prosecutor asked the trial judge to allow him to expand the record before the judge rules. During the further questioning, Officer A testifies: During the year before the accused’s arrest, she was an undercover officer assigned to infiltrate a particular local drug trafficking organization; during that time she participated in more than 30 meetings with suspected members of the gang; the accused attended and spoke during at least 10 of those meetings; at several meetings she personally observed the accused in possession of illegal drugs, including crack cocaine; in almost all of the meetings one or more gang members used the term “cake” and promised to make a delivery of “cake”; and after roughly two thirds of those meetings the officer witnessed the gang member who had previously referred to “cake” deliver crack cocaine to a fellow conspirator or buyer. Given that additional testimony, how should the trial judge rule? Should the judge overrule the objection on the ground that the testimony qualifies as a lay opinion?

Initially, the judge ought to identify the generalization that Officer A intends to rely on. Her generalization is that the members of this particular gang use the term “cake” as a code word for crack cocaine. In this state of the record, the generalization rests squarely on the witness’s “first-hand observations in a specific investigation.”<sup>215</sup> The question then arises whether the witness’s observations are so numerous and consistent that they support a finding that this gang follows a linguistic convention equating “cake” with crack cocaine. Officer A testified that she heard gang members use the term “cake” at tens of meetings and that after approximately two thirds of those occasions she witnessed gang members’ subsequent conduct indicating that they meant crack cocaine when they said “cake.” Although they said they were going to deliver “cake,” they in fact delivered crack cocaine. The judge should, and probably would, find that the foundation adequately validates the witness’s generalization under Rules 602 and 701.

If the witness’s generalization passes muster, the judge should then turn his attention to the witness’s knowledge of the case-specific fact being evaluated. Again, we are assuming that the prosecution laid an adequate authentication foundation for the audio recording. Earlier in her

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215. *Akins*, 746 F.3d at 599.

testimony, Officer A testified that she heard the accused speaking on at least ten occasions and is therefore presumably familiar with his voice.<sup>216</sup> At this point in Officer A's direct examination, the prosecutor replays the recording. Listening to the recording, Officer A hears the accused use the term "cake." Hence, Officer A undeniably has personal knowledge of the case-specific fact that the accused used that term.

Since both terms of the witness's comparative judgment satisfy the requirements for an admissible lay opinion, the judge should overrule the defense objection. There was no need for the prosecution to file an expert report previewing Officer A's testimony, and similarly there is no need for the judge to subject the opinion to a *Daubert* analysis.<sup>217</sup> Officer A's lay opinion is admissible.

## 2. Police Officer B

In this variation of the record, the prosecution calls Officer B rather than Officer A. Once again, the prosecutor seeks leave to augment the record before the judge rules; and the judge grants leave. Officer B testifies that: (1) she was not involved in the investigation that led to the current charges; (2) she has been assigned to the drug detail for over a decade; (3) during that decade she attended several courses on drug investigations at the police academy; (4) one of those courses covered the subject of the use of code words by drug traffickers; (5) she has never heard the term "cake" used by any suspect in a drug investigation she has personally participated in; and (6) at the police academy course she attended, one instructor stated that drug traffickers sometimes use terms such as "cake" when they mean an illegal drug. After listening to the recording, Officer B is prepared to opine that the accused's use of the term "cake" was a coded reference to crack cocaine. Now how should the trial judge rule?

Given the analytic framework proposed in this article, the judge should certainly not overrule the defense objection on the ground that Officer B's opinion qualifies as an admissible lay opinion. It is true that like Officer A, Officer B has personal knowledge of one term of the comparison, that is, the case-specific fact that the accused uttered the word "cake." However, when the judge shifts the analysis to the other term of the comparison, the witness's generalization about the meaning of "cake," the judge will be forced to conclude that the witness did not derive the generalization either solely or primarily through personal observation. Rather, Officer B is "'synthesi[zing] . . . various source materials,'"<sup>218</sup> notably the

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216. FED. R. EVID. 901(b)(5) ("The following are examples only—not a complete list—of evidence that satisfies the requirement [for authentication]: (5) Opinion About a Voice. An opinion identifying a person's voice, whether heard firsthand or through mechanical or electronic transmission or recording, based on hearing the voice at any time under circumstances that connect it with the alleged speaker.").

217. *Akins*, 746 F.3d at 598–600.

218. *United States v. Kamahele*, 748 F.3d 984, 999 (10th Cir. 2014); *see also* *United States v. Carlos Cruz*, 352 F.3d 499, 505 (1st Cir. 2003) (the witness relied on information

assertion she heard at the police academy course she attended. The conclusion is unavoidable: If this opinion is to be admitted at all, it must be admitted as an expert opinion.

If, as defense counsel claimed at the time of the objection, the prosecution did not furnish the defense with a detailed report previewing Officer B's opinionated testimony, that may be the end of the judge's analysis. Without even reaching the Rule 702 issue, the judge might well impose a discovery sanction altogether barring the opinion.

Even putting aside the procedural issue, the prosecutor will be hard pressed to persuade the judge that Officer B's testimony constitutes an admissible expert opinion. On the one hand, there is no problem with the case-specific fact term of the witness's comparison. Having listened to the same audio recording, Officer B has as much personal knowledge as Officer A that the accused used the term "cake."

On the other hand, the other term of the witness's comparison, the witness's generalization, is problematic. The judge should arguably conclude that the prosecutor has failed to establish that the witness's generalization that drug traffickers use "cake" as a synonym for crack cocaine qualifies under Rule 702 and *Daubert*. Other than an isolated statement at a single police academy course, Officer B has not marshaled any empirical data supporting the generalization. The isolated statement falls far short of constituting a scientific study. For that matter, there is no indication that the statement reflects a reliable compilation of field observations by other undercover drug officers. It is true that by virtue of the last sentence of Rule 104(a), in ruling on the admissibility of Officer B's opinion the judge may consider the statement made at the course.<sup>219</sup> The hearsay rule is not a bar.<sup>220</sup> Yet, even if the judge considers the statement, standing alone the statement is hardly persuasive proof of the existence of the linguistic convention. Without additional foundational proof, the statement is merely a solitary *ipse dixit* assertion by an unidentified speaker. As previously stated, in both *Joiner*<sup>221</sup> and *Kumho*,<sup>222</sup> the Supreme Court cautioned trial judges against indiscriminately accepting such assertions at face value. If the judge takes seriously the Court's characterization of the Rule 702 standard as "exacting,"<sup>223</sup> the prosecutor's expert testimony foundation for Officer B's opinion is wanting. In short, Officer B's testimony is inadmissible.<sup>224</sup> It cannot be accepted as either lay or expert opinion testimony.

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"known with the police department"); *People v. Sanchez*, 6 Cal. Rptr. 3d 271, 275–76 (Cal. Ct. App. 2003) (the police witness relied on his training as well as his personal experience).

219. FED. R. EVID. 104(a).

220. *See id.*

221. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997).

222. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999).

223. *Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000).

224. *See United States v. Hermanek*, 289 F.3d 1076, 1093 (9th Cir. 2002) ("Neither the government's offer of proof nor the qualification of Broderick on the stand established that his interpretations of new words and phrases as references to cocaine were supported by reliable methods.").

The distinction between the testimony of Officer A and Officer B dovetails with the difference between the appellate court's analysis in *United States v. Akins*<sup>225</sup> and the trial judge's analysis in *United States v. Dukagjini*.<sup>226</sup> In *Akins*, the analysis by the Fifth Circuit Court of Appeals was exemplary. At trial, the prosecution called a veteran Secret Service agent, Lyons, to testify as to the interpretation of alleged code words on intercepted calls between the alleged coconspirators. For example, Lyons opined that "three zones" meant "three ounces."<sup>227</sup> The court upheld the foundation for Lyons' opinion because Lyons had personal knowledge that in conversations the co-conspirators had used those "terms interchangeably."<sup>228</sup> The court's analysis was both detailed and sound.

However, in *Dukagjini*, the prosecution witness, an experienced Drug Enforcement Agency agent, Biggs, overstepped the bounds.<sup>229</sup> Initially, the trial judge warned the prosecution to restrict Biggs to opinions about "words of trade, jargon."<sup>230</sup> However, as the trial unfolded, Biggs strayed, and the trial judge did not reign him in.<sup>231</sup> Although Biggs opined about the meaning of certain terms used by the alleged co-conspirators, there was "[n]o evidence [in the record] that these phrases were drug code with fixed meaning either within the narcotics world or within this particular conspiracy."<sup>232</sup> That gap was fatal to the admissibility of Biggs' conclusions. The admission of the conclusions could not be justified as expert opinions because Biggs never established that he had reliable out-of-court sources warranting his belief that the words had acquired a particular meaning in the drug milieu.<sup>233</sup> Moreover, the introduction of the conclusions could not be rationalized as lay opinions because, unlike agent Lyons in *Akins*, Biggs did not describe any aspects of specific conversations among alleged co-conspirators that rationally supported his inference that they had used the words in the particular sense that he attributed to them. While *Akins* is the model,<sup>234</sup> *Dukagjini* is the cautionary tale.<sup>235</sup>

#### IV. CONCLUSION

There is a widespread perception that the courts are struggling in endeavoring to draw the line between lay opinion and expert opinion. In the

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225. 746 F.3d 590 (5th Cir. 2014), *cert. denied sub nom.* Perkins v. United States, 135 S.Ct. 189 (2014).

226. 326 F.3d 45 (2d Cir. 2003).

227. *Atkins*, 746 F.3d at 600 n.15.

228. *Id.*

229. *Dukagjini*, 326 F.3d at 49–50.

230. *Id.* at 50.

231. *See id.*

232. *Id.* at 55.

233. *Id.*

234. *Riley v. Univ. of Ala. Health Servs. Found.*, 990 F. Supp. 2d 1177, 1186 (N.D. Ala. 2014); *Parrott v. PNC Bank, Nat. Ass'n*, 986 F. Supp. 2d 1263, 1271 (N.D. Ala. 2013) ("The nature and extent of the . . . observations of the witness should be as detailed as possible . . .").

235. *See generally Atkins*, 746 F.3d 590; *Dukagjini*, 326 F.3d at 45.



view of some commentators, the courts are experiencing “tremendous difficulty” in distinguishing between the two types of opinion.<sup>236</sup> The microcosm of case law analyzing the admissibility of police officer testimony about the meaning of alleged drug code words illustrates that difficulty.<sup>237</sup> In those cases, the courts are finding the distinction to be a troublingly “fine line.”<sup>238</sup> Worse still, two 1993 developments, the amendment to Federal Rule of Civil Procedure 26 and the Supreme Court’s *Daubert* decision, have heightened the need to define that line with confidence.<sup>239</sup>

The thesis of this article is that the distinction has proven to be unmanageable because the courts have looked to unsatisfactory bases for defining the distinction. Admittedly, there is a clear difference between the policy rationale for admitting lay opinions (the witness’s inability to articulate the primary underlying data) and the justification for accepting expert opinions (the expert’s superior ability to draw a reliable inference from the underlying data). However, even if the trial judge appreciates that theoretical difference, without more that insight does not provide the judge with a concrete analytic frame for drawing the line in a particular case. Part II explained why the other attempts to define the distinction, focusing on characteristics of the final opinion, are equally unhelpful.

This article has argued that to draw the line and intelligently analyze the admissibility of lay and expert opinions, the judge should focus on the reasoning processes underlying the two types of opinions. In both cases, the witness makes a comparative judgment, employing a generalization to evaluate a case-specific fact or facts. Part II demonstrated that there are fundamental epistemological differences between the two types of opinions. While lay witnesses form their generalizations primarily through firsthand knowledge, out of necessity experts rely on other, hearsay sources of information.<sup>240</sup> Like Newton, to some extent, every expert stands on the shoulder of the giants who preceded him or her.<sup>241</sup> Furthermore, although lay witnesses must acquire their information about the case-specific facts to be evaluated exclusively through personal knowledge, Federal Rule of Evidence 703 permits experts to draw on a much wider range of sources of information.<sup>242</sup> Once the judge appreciates the basic differences between the reasoning process underlying a lay opinion

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236. Scieszinski, *supra* note 14, at 1181. *But see* *United States v. Are*, 590 F.3d 499, 512 (7th Cir. 2009) (“This circuit has routinely upheld the admission of expert testimony from law enforcement purporting to translate ‘code words’ used by conspirators during intercepted phone calls.”); *United States v. Gibbs*, 190 F.3d 188, 211–12 (3d Cir. 1999) (“Such testimony is relatively uncontroversial when it permits a government agent to explain the actual meaning of coded words—that is, when the agent acts as a translator of sorts . . .”).

237. Scieszinski, *supra* note 14, at 1182–83. *See* *United States v. Kamahale*, 748 F.2d 984 (10th Cir. 2014); *Akins*, 746 F.3d 590.

238. Scieszinski, *supra* note 14, at 1182.

239. *See* FED. R. CIV. P. 26(a)(2)(A); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993).

240. *See* FED. R. EVID. 701; FED. R. EVID. 703.

241. *See* Merton, *supra* note 110, at 9.

242. *See* FED. R. EVID. 701; FED. R. EVID. 703.

and that supporting an expert opinion, the analysis is fairly straightforward. By carefully dissecting the reasoning process underpinning the witness's opinion, the courts will not only improve the courts' ability to distinguish between lay and expert opinions; as Part III demonstrated, clarifying the distinction should also sharpen the courts' analysis of the admissibility of the two species of opinion. In *Daubert*, Justice Blackmun quite properly wrote that the focus should "not [be] on the conclusions" that the expert is prepared to testify to.<sup>243</sup> Rather, like an epistemologist, the judge ought to ask: What is the warrant for that conclusion? How did you reason to that opinion?<sup>244</sup>

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243. *Daubert*, 509 U.S. at 595.

244. *United States v. Akins*, 746 F.3d 590, 600 n.15 (5th Cir. 2014) ("Lyons repeatedly explained how this investigation led him to deduce the meaning of drug code words. Lyons explained, for example, that he knows 'three zones' is 'three ounces' because he heard the speakers on the intercepted calls use the terms interchangeably; . . . that a 'nine' referred to nine ounces of cocaine because the quoted price was consistent with that amount in the investigation here . . . ."); *Beastie Boys v. Monster Energy Co.*, 983 F. Supp. 2d 369, 372 (S.D.N.Y. 2014) ("[A]n expert opinion requires some explanation as to how the expert came to his conclusion . . . .").